To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

---

IN THE SENATE OF THE UNITED STATES

OCTOBER 18, 2021

Ms. KLOBUCHAR (for herself, Mr. GRASSLEY, Mr. DURBIN, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. KENNEDY, Mr. BOOKER, Ms. LUMMIS, Ms. HIRONO, Mr. WARNER, Mr. HAWLEY, and Mr. DAINES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “American Innovation and Choice Online Act”.

SEC. 2. UNLAWFUL CONDUCT.

(a) VIOLATION.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, if
it is shown, by a preponderance of the evidence, that the person has engaged in conduct that would—

(1) unfairly preference the covered platform operator’s own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform;

(2) unfairly limit the ability of another business user’s products, services, or lines of business to compete on the covered platform relative to the covered platform operator’s own products, services, or lines of business in a manner that would materially harm competition on the covered platform; or

(3) discriminate in the application or enforcement of the covered platform’s terms of service among similarly situated business users in a manner that may materially harm competition on the covered platform.

(b) UNLAWFUL CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, if it is shown, by a preponderance of the evidence, that the person has engaged in conduct that would—

(1) materially restrict or impede the capacity of a business user to access or interoperate with the same platform, operating system, hardware or soft-
ware features that are available to the covered plat-
form operator’s own products, services, or lines of
business that compete or would compete with prod-
ucts or services offered by business users on the cov-
ered platform;

(2) condition access to the covered platform or
preferred status or placement on the covered plat-
form on the purchase or use of other products or
services offered by the covered platform operator
that are not part of or intrinsic to the covered plat-
form itself;

(3) use non-public data that are obtained from
or generated on the covered platform by the activi-
ties of a business user or by the interaction of a cov-
ered platform user with the products or services of
a business user to offer, or support the offering of,
the covered platform operator’s own products or
services that compete or would compete with prod-
ucts or services offered by business users on the cov-
ered platform;

(4) materially restrict or impede a business user
from accessing data generated on the covered plat-
form by the activities of the business user, or
through an interaction of a covered platform user
with the business user’s products or services, such as
by establishing contractual or technical restrictions
that prevent the portability of the business user’s
data by the business user to other systems or appli-
cations;

(5) unless necessary for the security or func-
tioning of the covered platform, materially restrict or
impede covered platform users from un-installing
software applications that have been preinstalled on
the covered platform or changing default settings
that direct or steer covered platform users to prod-
ucts or services offered by the covered platform op-
erator;

(6) in connection with any covered platform
user interface, including search or ranking
functionality offered by the covered platform, treat
the covered platform operator’s own products, serv-
ices, or lines of business more favorably relative to
those of another business user than they would be
treated under standards mandating the neutral, fair,
and non-discriminatory treatment of all business
users; or

(7) retaliate against any business user or cov-
ered platform user that raises concerns with any law
enforcement authority about actual or potential vio-
lations of State or Federal law.
(c) **Rule of Construction.**—Subsections (a) and (b) shall not be construed to require a covered platform operator to divulge, license, or otherwise grant the use of the covered platform operator’s intellectual property, trade or business secrets, or other confidential proprietary business processes to a business user.

(d) **Affirmative Defenses.**—

(1) **In General.**—Subsection (a) shall not apply if the defendant establishes by a preponderance of the evidence that the conduct described in subsections (a) was narrowly tailored, was nonpretextual, and was necessary to—

(A) prevent a violation of, or comply with, Federal or State law;

(B) protect safety, user privacy, the security of non-public data, or the security of the covered platform; or

(C) maintain or enhance the core functionality of the covered platform.

(2) **Unlawful Conduct.**—Subsection (b) shall not apply if the defendant establishes by a preponderance of the evidence that the conduct described in subsection (b)—

(A) has not resulted in and would not result in material harm to the competitive process
by restricting or impeding legitimate activity by
business users; or

(B) was narrowly tailored, could not be
achieved through less discriminatory means,
was nonpretexstual, and was necessary to—

(i) prevent a violation of, or comply
with, Federal or State law;

(ii) protect safety, user privacy, the
security of non-public data, or the security
of the covered platform; or

(iii) maintain or enhance the core
functionality of the covered platform.

(e) COVERED PLATFORM DESIGNATION.—The Fed-
eral Trade Commission and Department of Justice may
jointly, with concurrence of the other, designate a covered
platform for the purpose of implementing and enforcing
this Act. Such designation shall—

(1) be based on a finding that the criteria set
forth in clauses (i) through (iii) of subsection (h)(4)
are met;

(2) be issued in writing and published in the
Federal Register; and

(3) apply for 7 years from its issuance regard-
less of whether there is a change in control or own-
ership over the covered platform unless the Commis-
sion or the Department of Justice removes the designation under subsection (f).

(f) REMOVAL OF COVERED PLATFORM DESIGNATION.—The Commission or the Department of Justice shall—

(1) consider whether its designation of a covered platform under subsection (e) should be removed prior to the expiration of the 7-year period if the covered platform operator files a request with the Commission or the Department of Justice, which shows that the online platform no longer meets the criteria set forth in clauses (i) through (iii) of subsection (h)(4);

(2) determine whether to grant a request submitted under paragraph 1 not later than 120 days after the date of the filing of such request; and

(3) obtain the concurrence of the Commission or the Department of Justice, as appropriate, before granting a request submitted under paragraph (1).

(g) REMEDIES.—The remedies provided in this subsection are in addition to, and not in lieu of, any other remedy available under Federal or State law.

(1) CIVIL PENALTY.—Any person who is found to have violated subsections (a) or (b) shall be liable to the United States or the Commission for a civil 

VerDate Sep 11 2014 01:55 Oct 19, 2021 Jkt 029200 PO 00000 Frm 00007 Fmt 6652 Sfmt 6201 E:\BILLS\S2992.IS S2992pbinns on DSKJLVW7X2PROD with BILLS
penalty, which shall accrue to the United States Treasury, in an amount not more than 15 percent of the total United States revenue of the person for the period of time the violation occurred.

(2) INJUNCTIONS.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(3) REPEAT OFFENDERS.—If the fact finder determines that a person has engaged in a pattern or practice of violating this Act, the court shall consider requiring, and may order, that the Chief Executive Officer, and any other corporate officer as appropriate to deter violations of this Act, forfeit to the United States Treasury any compensation received by that person during the 12 months preceding or following the filing of a complaint for an alleged violation of this Act.

(h) DEFINITIONS.—In this section:

(1) ANTITRUST LAWS.—The term “antitrust laws” has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(2) BUSINESS USER.—The term “Business User” means a person that utilizes or is likely to
utilize the covered platform for the sale or provision of products or services, including such persons that are operating a covered platform or are controlled by a covered platform operator.


(4) Covered platform.—The term “covered platform” means an online platform—

(A) that has been designated as a covered platform under section 2(e); or

(B) that—

(i) at any point during the 12 months preceding a designation under section 2(e) or at any point during the 12 months preceding the filing of a complaint for an alleged violation of this Act—

(I) has at least 50,000,000 United States-based monthly active users on the online platform; or

(II) has at least 100,000 United States-based monthly active business users on the online platform;

(ii) at any point during the 2 years preceding a designation under section 2(e) or at any point during the 2 years preceding
ceeding the filing of a complaint for an alleged violation of this Act, is owned or controlled by a person with United States net annual sales or a market capitalization greater than $550,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; and

(iii) is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.

(5) Critical Trading Partner.—The term “critical trading partner” means a person that has the ability to restrict or materially impede the access of—

(A) a business user to its users or customers; or

(B) a business user to a tool or service that it needs to effectively serve its users or customers.

(6) Person.—The term “person” has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(7) Data.—
(A) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Commission shall adopt rules in accordance with section 553 of title 5, United States Code, to define the term “data” for the purpose of implementing and enforcing this Act.

(B) DATA.—The term “data” shall include information that is collected by or provided to a covered platform or business user that is linked, or reasonably linkable, to a specific—

(i) user or customer of the covered platform; or

(ii) user or customer of a business user.

(8) ONLINE PLATFORM.—The term “online platform” means a website, online or mobile application, operating system, digital assistant, or online service that—

(A) enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform;

(B) facilitates the offering, sale, purchase, payment, or shipping of products or services, including software applications, between and
among consumers or businesses not controlled
by the platform operator; or

(C) enables user searches or queries that
access or display a large volume of information.

(9) CONTROL.—The term “control” with re-
spect to a person means—

(A) holding 25 percent or more of the
stock of the person;

(B) having the right to 25 percent or more
of the profits of the person;

(C) having the right to 25 percent or more
of the assets of the person, in the event of the
person’s dissolution;

(D) if the person is a corporation, having
the power to designate 25 percent or more of
the directors of the person;

(E) if the person is a trust, having the
power to designate 25 percent or more of the
trustees; or

(F) otherwise exercises substantial control
over the person.

(10) STATE.—The term “State” means a State,
the District of Columbia, the Commonwealth of
Puerto Rico, and any other territory or possession of
the United States.
(i) **Enforcement.—**

(1) *In general.*—Except as otherwise provided in this Act—

(A) the Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act;

(B) the Attorney General shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms of the Sherman Act (15 U.S.C. 1 et seq.), Clayton Act (15 U.S.C. 12 et seq.), and Antitrust Civil Process Act (15 U.S.C. 1311 et seq.) were incorporated into and made a part of this Act; and

(C) any attorney general of a State shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms of the Sherman Act (15 U.S.C. 1 et seq.) and the Clayton Act (15 U.S.C. 12 et seq.)
were incorporated into and made a part of this Act.

(2) UNFAIR METHODS OF COMPETITION.—A violation of this Act shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

(3) COMMISSION INDEPENDENT LITIGATION AUTHORITY.—If the Commission has reason to believe that a person violated this Act, the Commission may commence a civil action, in its own name by any of its attorneys designated by it for such purpose, to recover a civil penalty and seek other appropriate relief in a district court of the United States.

(4) PARENS PATRIAE.—Any attorney general of a State may bring a civil action in the name of such State for a violation of this Act as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.

(j) EMERGENCY RELIEF.—

(1) IN GENERAL.—The Commission, Assistant Attorney General of the Antitrust Division, or any attorney general of a State may seek a temporary injunction requiring the covered platform operator to
take or stop taking any action for not more than
120 days and the court may grant such relief if the
Commission, the United States, or the attorney gen-
eral of a State proves—

(A) there is a claim that a covered plat-
form operator took an action that would violate
this Act; and

(B) that action impairs the ability of busi-
ness users to compete with the covered platform
operator.

(2) EMERGENCY RELIEF.—The emergency re-
relief shall not last more than 120 days from the filing
of the complaint.

(3) TERMINATION.—The court shall terminate
the emergency relief at any time that the covered
platform operator proves that the Commission, the
United States, or the attorney general of the State
seeking relief under this section has not taken rea-
sonable steps to investigate whether a violation has
occurred.

(4) OTHER EQUITABLE RELIEF.—Nothing in
this subsection prevents or limits the Commission,
the United States, or any attorney general of any
State from seeking other equitable relief as provided
in subsection (g) of this section.
(k) **Statute of Limitations.**—A proceeding for a violation of this section may be commenced not later than 6 years after such violation occurs.

SEC. 3. JUDICIAL REVIEW.

(a) In General.—Any party that is subject to a covered platform designation under section 2(e) of this Act, a decision in response to a request to remove a covered platform designation under section 2(f) of this Act, a final order issued in any district court of the United States under this Act, or a final order of the Commission issued in an administrative adjudicative proceeding under this Act may within 30 days of the issuance of such designation, decision, or order, petition for review of such designation, decision, or order in the United States Court of Appeals for the District of Columbia Circuit.

(b) Treatment of Findings.—In a proceeding for judicial review of a covered platform designation under section 2(e) of this Act, a decision in response to a request to remove a covered platform designation under section 2(f) of this Act, or a final order of the Commission issued in an administrative adjudicative proceeding under this Act, the findings of the Commission or the Assistant Attorney General as to the facts, if supported by evidence, shall be conclusive.
SEC. 4. ENFORCEMENT GUIDELINES.

(a) In general.—Not later than 1 year after the date of enactment of this Act, the Commission and the Assistant Attorney General of the Antitrust Division shall jointly issue guidelines outlining policies and practices, relating to agency enforcement of this Act, including policies for determining the appropriate amount of a civil penalty to be sought under section 2(g)(1) of this Act, with the goal of promoting transparency, deterring violations, and imposing sanctions proportionate to the gravity of individual violations.

(b) Updates.—The Commission and the Assistant Attorney General of the Antitrust Division shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 4 years beginning on the date of enactment of this Act.

(c) Operation.—The Joint Guidelines issued under this section do not confer any rights upon any person, State, or locality, nor shall they operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in such Guidelines.

SEC. 5. RULE OF CONSTRUCTION.

(a) Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18 of the United States Code is not dis-
positive of whether the defendant has established an af-
firmative defense under this Act.

(b) An action taken by a covered platform operator
that is reasonably tailored to protect the rights of third
parties under sections 106, 1101, 1201, or 1401 of title
17 of the United States Code or rights actionable under
sections 32 or 43 of the Lanham Act (15 U.S.C. 1114,
1125), or corollary state law, shall not be considered un-
lawful conduct under subsection 2(a) or (b) of this Act.

(c) Nothing in this Act shall be construed to limit
any authority of the Attorney General or the Commission
under the antitrust laws, the Federal Trade Commission
Act (15 U.S.C. 45), or any other provision of law or to
limit the application of any law.

SEC. 6. SEVERABILITY.

If any provision of this Act, an amendment made by
this Act, or the application of such provision or amend-
ment to any person or circumstance is held to be unconsti-
tutional, the remainder of this Act and of the amendments
made by this Act, and the application of the remaining
provisions of this Act and amendments to any person or
circumstance shall not be affected.